

<b>WALT KOCHER</b>	)	
Claimant	)	
V.	)	
	)	
<b>COMPASS MINERALS</b>	)	CS-00-0440-694
Respondent	)	AP-00-0445-397
AND	)	
	)	
<b>ACE AMERICAN INSURANCE CO.</b>	)	
Insurance Carrier	)	

Claimant requested review of the September 3, 2019, Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on January 9, 2020.

Jeff K. Cooper, of Topeka, Kansas, appeared for Claimant. Kevin M. Johnson, of Overland Park, Kansas, appeared for Respondent and its insurance carrier.

The Board has considered the record and adopted the stipulations listed in the Award.

1. What is the nature and extent of Claimant's disability?
2. Is Claimant entitled to future medical treatment?

Claimant appeals asserting Dr. Goin's and Dr. Zarr's opinions were so undermined on cross-examination and are so dated as to not have any credibility. Claimant requests the ALJ's denial of future medical care be reversed and the ALJ's impairment rating should be recalculated to be based on Dr. Murati's rating. Claimant contends he has clearly met his burden to prove he will likely need future medical care related to this injury and the opinions of respondent's medical experts contrariwise are either outdated or unpersuasive.

Respondent contends the ALJ's Award should be affirmed.

### FINDINGS OF FACT

The ALJ found Claimant has a 4.5 percent permanent impairment of function to the left lower extremity. This Award was based on giving equal weight to the opinions of Drs. Murati and Zarr. The ALJ further found Claimant failed to overcome the statutory presumption and has failed to establish that it is more probable than not that he will require future medical treatment for his left knee injury. Claimant was found entitled to medical expenses, and any unauthorized medical expenses, up to the statutory limit.

Claimant has worked for Respondent since 1990. In 2017, Claimant, in his job as a Warehouse B operator, operated forklifts, shuttle wagons to move rail cars, and "yard dogs." Claimant also serviced fire trucks and moved trailers.

On September 11, 2017, while moving rail cars, Claimant slipped and injured his left knee. Claimant continued working another hour and one-half until his knee became so painful he could not put weight on it. Claimant reported the accident to his employer.

Claimant was sent to Dr. Scott G. Goin, who diagnosed Claimant with a torn meniscus in his left knee. Claimant had knee surgery on December 8, 2017. Claimant had several follow-up visits with Dr. Goin, with the last one being April 20, 2018, at which time Claimant was found to be at maximum medical improvement. Dr. Goin assigned a two percent impairment rating to the left lower extremity using the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 4<sup>th</sup> Edition. Dr. Goin did not expect Claimant to need further treatment.

According to Claimant, the surgery helped his knee, but he continues to have pain and weakness in his left knee. The pain in Claimant's left knee is worse with activity. He has difficulty with stairs and walking long periods of time.

Claimant returned to regular duty with Respondent. He has not missed any work due to his left knee since he returned to work. He anticipates a flare-up occasionally in his left knee, so he would like to keep medical open.

Dr. Pedro A. Murati evaluated Claimant on February 12, 2019, at the request of his attorney. Claimant's complaints were: discomfort in the left knee; inability to bear weight on the left knee; tenderness in the knee when walking long distances or on long drives; left knee gives out sometimes; pain in knee during and after work; sharp pain and pinching in the left knee and; difficulty walking after long work shifts.

Dr. Murati examined Claimant and found the following: "status post left knee arthroscopy partial medial with Dr. Goin, 2017; left patellofemoral syndrome; and Pes Anserine bursitis." Dr. Murati opined the September 11, 2017, work injury was the prevailing factor for all these diagnoses. He opined Claimant will need future medical treatment, at the very least yearly follow-ups. Future treatment could include, but not be

limited to physical therapy, injections, radiological studies, anti-inflammatory and pain medication and possible surgical intervention. Dr. Murati assigned six percent permanent impairment to the left lower extremity, using the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 6th Edition.

Dr. James S. Zarr evaluated Claimant, on July 17, 2019, at Respondent's request. Claimant had constant pain at a level of two or three on the pain scale of one to ten with ten being the worst pain. Claimant was examined and the impression was persistent left knee pain and status post left knee arthroscopic medial meniscectomy. Dr. Zarr found Claimant was at maximum medical improvement. According to Dr. Zarr, Claimant can perform his regular duties without restrictions. Dr. Zarr opined Claimant suffered permanent impairment attributable to the work-related injury and the work injury was the prevailing factor causing Claimant's persistent left knee pain. He assigned a impairment rating of three percent to the lower extremity, based on the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 6th Edition.<sup>1</sup> He did not believe Claimant would need future medical treatment.

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2017 Supp. 44-508(h) states:

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2017 Supp 44-508(u) states:

"Functional impairment" means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of impairment, if the impairment is contained therein.

K.S.A. 2017 Supp. 44-510d(b)(23) states:

Loss of or loss of use of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein, until January 1, 2015, but for injuries occurring on and after January 1, 2015, shall be determined by using the

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<sup>1</sup> The report to the deposition says 3%, but Dr. Zarr's testimony says 30%. Dr. Zarr waived signature, and therefore the mistake was not caught.

sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

The current law in Kansas is that the 6<sup>th</sup> Edition of the *American Medical Association Guides to the Evaluation of Permanent Impairment* is to be used to determine permanent impairment in Kansas workers compensation claims.<sup>2</sup> Dr. Goin's impairment rating for Claimant's impairment was based on the 4th Edition of the *American Medical Association Guides to the Evaluation of Permanent Impairment*.

The ALJ was correct in considering but not utilizing Dr. Goin's impairment rating. The Board agrees that the best indicator of Claimant's permanent impairment to his left lower extremity is giving equal weight to Dr. Zarr's rating and Dr. Murati's rating. It is found and concluded that Claimant's permanent impairment is 4.5 percent impairment to the left lower extremity.

K.S.A. 2017 Supp. 44-510h(e) provides:

(e) It is presumed that the employer's obligation to provide the services of a healthcare provider and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with K.S.A. 44-515(a), and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. As used in this subsection, "medical treatment" means only that treatment provided or prescribed by a licensed healthcare provider and shall not include home exercise programs or over-the-counter medications.

The evidence in this case justifies Claimant's future medical being left open. Claimant's symptoms of constant pain and weakness in his left knee, coupled with Dr. Murati's recommendation for future medical treatment is sufficiently persuasive to allow Claimant the opportunity to apply for future medical.

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<sup>2</sup> *Johnson v. U.S. Food Services*, 56 Kan. App. 2d 232, 427 P.3d 996 (2018) held that the use of *The American Medical Association Guides to the Evaluation of Permanent Impairment*, 6th Edition was unconstitutional. But that case is pending before the Kansas Supreme Court which stays the implementation of that decision.

**CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed in part and reversed in part. The Award as to functional impairment of 4.5 percent is affirmed. The ALJ's Award is reversed as to denial of future medical treatment and Claimant is granted the right to seek future medical care.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated September 3, 2019, is affirmed in part, and reversed in part.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2020.

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BOARD MEMBER

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BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: (Via OSCAR)

Jeff K. Cooper, Attorney for Claimant  
Kevin M. Johnson, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge